United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1902

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For the Second Circuit

No. 74-1902

MARIA IANUZZI,

Plaintiff-Appellant,

against

SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant & Third Party Plaintiff-Appellee-Appellant,

against

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLEE-APPELLANT

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Statement

Plaintiff-Appellant (hereinafter referred to as "plaintiff") has appealed from an order of the United States District Court for the Southern District of New York, Owen *D.J.*, dated June 12, 1974, and entered on June 17, 1974, dismissing her complaint (1144a, 1145a)*. Defendant

* Appendix references (a) are to the Appendix of the Plaintiff-Appellant.

and third party plaintiff submits this brief in opposition to the appeal of plaintiff and also in support of its appeal from so much of the Court's order of June 12, 1974, as dismisses the third-party complaint, should this Court see fit to alter the said order.

In the Court below plaintiff, as the administratrix of the estate of Mario Ianuzzi, sued to recover damages for the death of her intestate which resulted from injuries sustained by decedent on November 24, 1968, while he was working in the employ of third-party defendant International Terminal Operating Co., Inc., aboard the M/V South African Huguenot, a vessel owned by defendant and third party plaintiff. The Complaint, alleged negligence and unseaworthiness. In like manner, the third party complaint sought indemnity based upon the stevedore's breach of warranty of workmanlike service.

The Facts

Because plaintiff's assignment of error on this appeal is based on her contention that the testimony of fact witnesses precluded the Trial Judge from dismissing, as he did, the negligence count in her complaint, defendant-appellee (hereinafter referred to as "shipowner") believes it will be beneficial to provide the Court with a brief summary of the testimony of each of plaintiff's fact witnesses who testified to the condition of the cargo winches, which allegedly caused the accident.

The M/V South African Huguenot arrived at Pier 6, Brooklyn, New York, at 7:28 A.M. on Saturday, November 23, 1968, and commenced the loading of cargo at all hatches at 8:00 A.M. that same day. Loading continued throughout the day until 6:00 P.M. and was resumed at 8:00 A.M. on the morning of November 24, 1968. The longshoremen completed the loading of the vessel at 8:15 P.M. on Sunday,

November 24, 1968, and at 10:01 P.M. she sailed from her Pier 6 berth bound for Cape Town, South Africa (281a, 282a). According to the vessel's deck log book, plaintiff's intestate was injured at No. 3 hatch at 7:15 P.M., on November 24, 1968 (279a-281a).

Testimony of Giuseppe Coppola, Winchman

Giuseppe Coppola, the longshoreman winch operator, who was operating both of the hydraulic cargo winches at the forward end of the vessel's No. 3 hatch when decedent was injured (55a), testified that he experienced no prior difficulty with these winches, except for a single incident which occurred at about 11:00 to 11:30 A.M. on November 24, 1968 (52a-54a). Although permitted to refresh his recollection from testimony given by him at a previous deposition (64a-71a), Coppola declined to testify that he had experienced any trouble with these winches the day before the accident (53a, 54a). According to Mr. Coppola, his single complaint was prompted by the difficulty that he allegedly had with stiffness in the winch control handles which made these controls difficult to operate (52a, 54a, 233a-235a, 260a). When the stiffness in these controls was reported to a ship's officer he pumped oil into the system and worked the control handles back and forth until the stiff condition was remedied (52a-54a, 233a-235a). Thereafter, the controls worked without difficulty and Coppola experienced no further trouble with them (235a, 261a, 262a).

Mr. Coppola, testified that at the time of the accident he was attempting to load a large automobile into No. 3 upper 'tween deck (29,a 36a, 267a). In performing this operation he raised the automobile on the burton fall until it was approximately 5 to 6 feet above the ship's rail. He then carefully slacked the burton fall while simultaneously taking in on the up-and-down fall with the intention

of burtoning the car across the deck to the hatch square (47a, 48a, 59a). Mr. Coppola insisted, that as the automobile passed over the ship's rail, without his having made any change in the position of the winch controls, it suddenly commenced to drop very rapidly (59a). He immediately put the controls for the burton winch in the stop (neutral) position and simultaneously moved the controls for the up-and-down winch to the full hoist position (225a, 226a). However, these efforts were, according to him, unavailing and the automobile swung rapidly through a downward arc eventually coming to rest directly beneath the head of the up-and-down boom over the open hatch square (221a-228a).

Mr. Coppola did not see decedent on deck immediately prior to the accident nor did he see whether or not the automobile struck him (59a, 238a, 239a). He also conceded that following the accident he operated the same cargo winches in putting the automobile back onto the pier and removing the injured man from the No. 3 upper 'tween deck to the pier (239a-248a). Mr. Coppola admitted that at the time of the accident he had no trouble moving the allegedly stiff winch control handles which were the subject of his earlier complaint (220a, 223a, 233a, 261a, 262a). He attributed the alleged malfunction of the winches at the time of the accident to a brake failure on the burton winch (224a-233a, 262a-264a). This alleged failure of the brake on the burton winch occurred only at the time of the accident (262a, 263a) and did not occur when the same winches were used after the accident to return the automobile to the pier and remove the injured decedent from the vessel, even though no subsequent repairs were made (248a). Obviously, the jury, finding the vessel seaworthy (1132a), did not accept Mr. Coppola's testimony as to a brake failure at the time of the accident.

Testimony of Fred Garofala, Hatch Boss

Decedent's hatch boss, when called as a witness by the plaintiff testified that on the day of decedent's accident he received a complaint from Mr. Coppola that the forward cargo winches at No. 3 hatch were not working properly because they were not "coinciding". He understood this to mean that one winch was faster than the other (133a-134a). He could not recall when he received this complaint but surmised that it must have been sometime in the afternoon (133a, 172a). Upon receipt of this complaint he instructed his gangwayman to get the winches fixed. The gangwayman in turn called the officer in charge who pumped oil into the winch (136a-139a). Mr. Garofala received no other complaints concerning the vessel's winches (139a) although such complaints would usually have been made to him (130a).

Testimony of Frank Scotto, Gangwayman

Frank Scotto, when called as a witness on behalf of plaintiff, testified (344a):

> "Q. Did you have any problems with the winches at No. 3 hatch on this day?
>
> Mr. Cohen: You mean to his personal knowledge?
>
> The Court: Yes. If he knows.
>
> A. I don't know anything about winches. I wasn't at the winches."

He further testified on direct examination that he received three (3) complaints concerning the forward winches at No. 3 hatch on the day of decedent's accident (187a-189a). He also testified that he received approximately the same number of complaints from the winchmen the day before the accident (190a). On each occasion he allegedly called

"the Mate" who sent someone to pump oil into the winches (188a, 190a, 191a). According to Mr. Scotto's initial testimony, the three complaints concerning the winches which he allegedly received on the day of the accident were made by the winchman, Mr. Coppola, who only reported "they are not working right" without supplying further details (356a).

During the course of Scotto's cross-examination the following testimony was elicited (356a, 357a):

> "Q. Now I think you told Mr. Lory just a minute ago that on the day of this accident, Mr. Coppola complained to you about these winches on three occasions, is that correct? A. Yes, sir.
>
> Q. And did he tell you what the nature of his complaint was? A. That the winch wasn't working properly.
>
> Q. Is that all he said, did he tell you what difficulty he was having in operating these winches? A. That's all he said, they are not working right.
>
> Q. And you say he did this on three occasions? A. Three times that day, yes, sir.
>
> Q. Mr. Scotto, do you remember at your deposition on October 14, 1971, page 31, line 24, do you remember being asked this question:
>
> 'Q. Did you have any reports from either Mr. Coppola or Mr. Manfredino about these winches, complaints about these winches at any time of the day of the accident prior to the accident?'
>
> And did you give this answer?
>
> 'A. At 11:15, some time like that, he called me and he said, Frankly (Frankie), the levers are stiff.'
>
> Were you asked that question and did you give that answer? A. Yes, sir.
>
> Q. Does that refresh your recollection now that you got one complaint from the winch operator? A. This was at 11:30 and this time, but that day there were five different times."

The testimony of Messrs. Coppola, Garofala and Scotto here summarized, was the only testimony from fact witnesses called by plaintiff in support of her claims of negligence and unseaworthiness. Since the shipowners' fact witnesses all denied any knowledge of the alleged defects in the cargo winches at the forward end of No. 3 hatch or the receipt of any complaints from the longshoremen concerning these winches, no other testimony is available to plaintiff as a basis for this appeal.

An analysis of this testimony clearly shows that neither the hatch boss Fred Garofala, nor the gangwayman Frank Scotto had any personal knowledge of any defects in the vessel's cargo winches. The only competent testimony to these alleged defects was the testimony given by Giuseppe Coppola, the longshoreman winch operator. Significantly, Mr. Coppola, in contradiction to Mr. Scotto, who admittedly had no personal knowledge (344a) of the winches, testified that he made but one complaint at approximately 11:00 to 11:30 A.M. on November 24, 1968, that the winch handles were operating stiffly (52a, 54a). According to Mr. Coppola this defect was remedied by pumping oil into the winch control system (54a). Thereafter, Coppola had no further difficulty with stiffness in the winch control handles (235a, 261a, 262a). According to Mr. Coppola, the trouble which he had with the cargo winches at the time of decedent's accident was caused by too much slack in the burton fall occasioned by a brake failure (261a-263a). Mr. Garofala's testimony that he received but one complaint from Mr. Coppola on November 24, 1968, prior to the accident (133a) is, of course, compatible with the testimony given by Mr. Coppola.

Mr. Scotto's testimony, that on the day of the accident he received three complaints concerning the cargo winches from Mr. Coppola (187a-188a, 356a) is in direct contradiction to Mr. Coppola's testimony. However, Mr. Scotto did partially agree with Mr. Coppola, since he testified (188a) that when the alleged complaints were received he notified

the Mate who sent someone who pumped oil into the winch control system in order to correct the condition. There was no testimony at the trial that the defective brakes testified to by Mr. Coppola could be remedied by an infusion of oil into the winch control system. There was absolutely no testimony at the trial of prior complaints concerning alleged difficulty with winch brakes or sudden slackening of the cargo falls.

The contention on page 2 of the plaintiff's brief, that *all* witnesses to the accident were in agreement that the decedent, while looking down into No. 3 hatch was struck and knocked into the hatch by an automobile being loaded aboard the vessel, is misleading. This contention ignores the testimony of Joseph Andre, an employee of New Jersey Export Marine Carpenters (847a). Mr. Andre, who was subpoenaed as a witness by third party defendant International Terminal Operating Co., Inc., testified that at the time of decedent's accident three or four of his fellow carpenters were chocking the automobiles loaded into No. 3 hatch (853a). The lumber which these carpenters required for this chocking operation was provided by Andre who procured it from a pile of lumber stowed on deck on the inshore side of No. 4 hatch (851a, 852a). He testified that in order to get this lumber to the carpenters working in the No. 3 upper 'tween deck he positioned himself on the main deck on the inshore side about in the middle of the hatch (854a). From this position he dropped pieces of lumber through the hatch opening to the deck below (855a). He further testified that he was engaged in this procedure for a period of approximately ten minutes prior to decedent's accident (856a).

Mr. Andre also conceded that following the accident he informed the investigating police officer and a member of the ship's crew that a piece of wood he had dropped struck decedent (862a-867a). He further testified that following decedent's accident he went to the hospital where

decedent was being treated because he felt responsible for the injury and wished to be of assistance in the event that blood donors were needed (868a).

Mr. Andre's testimony when coupled with the testimony of Dr. Dominic DiMaio, the Chief Medical Examiner for New York City (903a), that the site of the fractures resulting in decedent's death was the vertex (top) of the head; that there was no evidence of fracture on the back of the head (906a) and that the injuries which his autopsy disclosed were compatible with a history of decedent having been struck by a piece of lumber falling on top of his head (927a) undoubtedly persuaded the trial jury that decedent's death did not occur in the manner alleged by plaintiff. The probability that the trial jury reached such a conclusion is further supported by the specific finding of the Trial Judge "that the sole cause of [illegible]uzzi's death was a piece of lumber dropped upon him by one Andre" (1145a).

It is of more than passing interest that plaintiff has, since the trial of this case, filed a complaint in the United States District Court for the Southern District of New York (74 Civ. 2497) against Andre's employer, New Jersey Export Marine Carpenters Inc., to recover damages for the wrongful death of her intestate.

POINT I

Plaintiff may not raise in this Court an issue which was not urged in the Court below.

The contention in plaintiff's brief that the shipowner had a duty to discontinue the use of the cargo winches at the forward end of No. 3 hatch because of the alleged multiple unspecified complaints of their malfunction received by ship's personnel is raised for the first time on this appeal. No reference to such a duty was made in plaintiff's complaint, in her answers to the shipowner's interrogatories or in the pre-trial order. Throughout the

trial no suggestion of such a duty was ever made by counsel for the respective parties, by the Trial Judge or by any of the fact or expert witnesses who testified. In view of the foregoing, there was of course, no allusion by counsel below to the duty here suggested. Finally, no reference was made by plaintiff's counsel to the claimed duty during his argument at the critical moment when plaintiff's negligence count was about to be stricken by the Trial Court (969a-990a, 1001a-1004a).

It is submitted that the jury, as sole triers of the facts, having by their verdict rejected plaintiff's only theory of liability (defective cargo winches), she should not now be permitted to raise for the first time on this appeal a second theory of liability. *Parenzan* v. *Iino Kaiun Kabushiki Kaisya,* 251 F.2d 928, 930 (2 Cir., 1958), cert. den. *International Terminal Operating Co.* v. *Iino Kaiun Kaisha, Ltd.,* 356 U.S. 939; *Fenton* v. *A/S Glitire,* 370 F.2d 146 (2 Cir., 1966), cert. den. 387 U.S. 944.

As this Court, in discussing an analogous situation said in *Pettus* v. *Grace Line, Inc.,* 305 F.2d 151, 155 (2 Cir., 1962):

> "In order to preserve for our consideration the question of a possible material breach in hindering the stevedoring companies' performance, it would have been necessary for the appellants' counsel to take *some action* at trial to bring this theory to the judge's attention." (Emphasis supplied.)

POINT II

Assuming this Court will consider plaintiff's claim as to the new duty, the Trial Court did not err in dismissing the negligence count in plaintiff's complaint.

The "broad brush" approach employed in plaintiff's brief should not be permitted to obscure the actual testimony of fact witnesses upon which her appeal must neces-

sarily be based. Although the attempt is made to equate the gangwayman Scotto's testimony to five complaints which he allegedly received with five actual instances of winch malfunction, the trial record makes it abundantly clear that this is simply not so. Mr. Coppola, the longshoreman winch operator, concededly the only fact witness with personal knowledge, testified unequivocally to the contrary.

Viewed in the light most favorable to plaintiff, the gangwayman's testimony was at most only evidence that the alleged complaints were made. Manifestly, such complaints could have been prompted by the operator's inexperience or his dissatisfaction with the distinct operating features of the hydraulic winch as opposed to the more commonly used electric winch (84a-90a). They are not, as plaintiff suggests, competent proof of a winch malfunction. Coppola, the winch operator, who alone among the fact witnesses, as everyone agreed, was in a position to supply competent testimony as to the actual condition of the cargo winches testified, as previously noted, that the only difficulty experienced with the winches prior to decedent's accident was stiffness of the winch control handles which made them difficult to operate (52a, 54a, 233a-235a, 260a). Allegedly, after ship's personnel pumped oil into the system, the control handles caused no further trouble (235a, 261a, 262a). The alleged sudden slackening of the burton fall and failure of the winch brake occurred only at the time of decedent's accident (262a, 263a). It is thus obvious that the shipowner had no actual or constructive notice of the winch defects which Coppola insisted were the cause of decedent's accident. Such notice was, of course, a condition precedent to the plaintiff's cause of action for negligence. *Rice* v. *Atlantic Gulf & Pacific Co.*, 484 F.2d 1318, 1320 (2 Cir., 1973); *Poignant* v. *United States*, 225 F.2d 595, 596 (2 Cir., 1955). Moreover, the alleged complaints referred to in plaintiff's brief were not causally connected to the brake failure or suddenly slack-

ening burton fall testified to by Coppola. Although contradicted by both plaintiff's and the shipowner's experts (480a, 481a, 601a) the winch operator insisted that the stiffness in the control handles to which he testified was corrected when the ship's crew pumped oil into the system (54a). However, as previously noted there was no testimony whatsoever that the addition of oil to the control system would in any way effect the alleged brake failure and sudden slackening of the burton fall which the winch operator testified caused decedent's accident. It is thus evident that the testimony of plaintiff's fact witnesses as to these "complaints" completely failed to supply the basic element of "cause in fact". Cf. Harper & James, *Law of Torts* (1956) § 20.2 p. 1110; Prosser, *Law of Torts* (4th Ed., 1971) § 41 p. 236. See also *Naylor* v. *Isthmian S.S. Co.*, 187 F.2d 538 (2 Cir., 1951); *Jackson* v. *Pittsburg Steamship Co.*, 131 F.2d 668 (6 Cir., 1942).

The Trial Judge correctly refused to permit the jury to speculate on the basis of the alleged multiple complaints by submitting the negligence count to them for resolution.

POINT III

The trial jury's finding that the vessel was seaworthy precluded any possibility of a finding of negligence on the ground alleged in plaintiff's brief.

Plaintiff's contention, that the trial jury's finding that the cargo winches were seaworthy would have been consistent with a further finding that the shipowner was negligent in continuing to use these winches, is without merit.

The absurdity of the contention is best illustrated by reference to the Court's charge. The Trial Judge charged the jury:

* * *

"As I said before, the duty to supply a seaworthy vessel is an absolute duty and if the vessel fails in this duty, and as a proximate result a crew member, or in this case a longshoreman doing crew members' work is injured, then the ship owner is liable for the resulting damages.

* * *

Bear in mind that unseaworthiness is a condition. How the condition came into being, whether by negligence or otherwise is irrelevant to the ship owner's liability. It is the fact of unseaworthiness, if you find it exists, that renders the ship owner liable." (1104a)

* * *

"The plaintiff claims that there was a winch failure at the number 3 hatch, as a direct result of which her husband was knocked into the hatch by a car and suffered injuries from which he died five days later.

If you do find, as a (the) plaintiff claims, that a winch or winches were not reasonably fit for the purposes for which they were being used, and as Mr. Coppola testified, that there was a winch failure, then I charge you that you have sufficient to find an unseaworthy condition existed." (1107a)

Plaintiff's counsel took no exceptions to the Court's charge (1121a, 1122)

The Trial Jury was clearly instructed to return a verdict for plaintiff if they found that there was a winch failure as a result of which the winches were not reasonably fit for the purposes for which they were being used. Plaintiff cannot logically argue, as she does, that the same operative facts from which the jury concluded that there was no winch failure would simultaneously support a finding that the shipowner was negligent in permitting continued use of these seaworthy winches.

This Court when confronted with an analogous situation stated:

> "* * * It is hard to imagine, especially on the facts of this case, how an owner could be negligent, if the ship was not unseaworthy, * * *" *Spano* v. *Koninklijke Rotterdamsche Lloyd,* 472 F.2d 33, 35 n. 1 (2 Cir., 1973). See also *Poller* v. *Thorden Lines A/B* 336 F. Supp. 1231 (E.D. Pa., 1970); *Turner* v. *"The Cabins", Tanker, Inc.,* 327 F. Supp. 515 (D.C. Del., 1971).

Rice v. *Atlantic Gulf & Pacific Co.,* 484 F.2d 1318 (2 Cir., 1973) cited on page 8 of plaintiff's brief is clearly distinguishable from this case on appeal. Rice alleged that he was injured when he slipped and fell on an oily engine room stairway. Although the trial court charged the jury on both negligence and unseaworthiness, the jury returned a verdict in Rice's favor solely on the issue of negligence without any reference to the issue of unseaworthiness. Thereafter the trial judge granted the shipowner's motion for judgment n.o.v. on the grounds of insufficient evidence and plaintiff appealed.

This Court affirmed the judgment of the District Court as to the claim of negligence because there was no proof of actual or constructive notice. However, the Court reversed as to the claim of unseaworthiness. In so doing, the Court pointed out that plaintiff had testified that immediately after his fall he discovered oil on his arm and shirt that had not been there before and that there was also testimony concerning oil atomization causing a film of oil which required continuous wiping of the stairway from which plaintiff fell. In the Court's opinion, there was a basis, independent of plaintiff's testimony, from which the jury could infer the presence of oil on the stairway steps. However, the Court also cautioned: (page 1321)

> "Our decision must not be construed as a holding that every case where a seaman claims injuries as a

result of slipping on oil or grease must as a matter of law be submitted to the jury. * * *"

POINT IV

If this Court should reverse the Court below and remand this case for a new trial, then the dismissal of the third-party complaint against the third-party defendant-appellee should also be reversed.

The District Court's order from which plaintiff appeals reads in part (A. 1144a, 1145a):

> "* * * Subsequent to the verdict, defendant and third-party defendant, International Terminal Operating Co., agreed to have the determination of the remaining claims of breach of warranty (upon which evidence was also submitted at the trial) determined by the Court, provided the Court's findings were not inconsistent with the jury's verdict in the main cause of action.
>
> * * *
>
> Therefore, there being no breach of warranty by either the defendant or the third-party defendant, I dismiss the respective causes of action without costs or disbursements."

Obviously, if this Court should see fit to reverse and remand this case for a new trial, a similar action is required with respect to the shipowner's indemnity suit against the third-party defendant, stevedore, because of the provisions of the District Court's order. As this Court said in *Caputo* v. *U.S. Lines Company,* 311 F.2d 413 (2 Cir., 1963), cert. den. 374 U.S. 833 (p. 416):

> "Inconsistent determinations based upon the same evidence at the same trial are logically impossible. The Court must follow the verdict of the jury."

CONCLUSION

The judgment below should be affirmed—if not, then the order dismissing the third-party complaint should be reversed and the case remanded for a new trial.

Respectfully submitted,

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